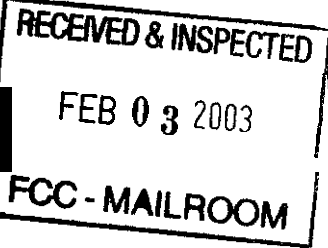


Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of

Petition for Declaratory Ruling that
AT&T's Phone-to-Phone IP Telephony
Services Are Exempt from Access Charges

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WC Docket No. 02-361

REPLY COMMENTS OF IDT CORPORATION

Pursuant to the Commission's Public Notice on December 3, 2002,¹ IDT Corporation ("IDT") hereby submits its Reply Comments on the Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges ("AT&T Petition"), filed on October 18, 2002. IDT submits these comments in order to counter some of the gross distortions regarding the regulatory status of phone-to-phone IP telephony set forth by several commenters as well as to note our concern over the self-help methods undertaken by LECs. That commenters – primarily LECs - would purposefully and flagrantly distort the Commission's record (as if the Commission is somehow unaware of its own position) reveals a contempt for the Commission that these commenters usually reserve for their competitors. IDT urges the Commission to swiftly grant AT&T's Petition in its entirety and consider appropriate penalties against those LECs that willfully ignore the Commission's rules and impose self-help measures in lieu of using the Commission's dispute process.

¹ Wireline Competition Bureau Extends Deadline for Filing Reply Comments to Comments on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Public Notice, DA 02-3334 (Feb. December 3, 2002).

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A. Commenters Opposing AT&T Distort The Commission's Earlier Findings On IP Telephony

As a basis for their argument that AT&T's phone-to-phone IP telephony is a telecommunications service subject to access charges, several commenters² carefully select and cite language *ad nauseum* from the Commission's Report to Congress,³ wherein the Commission considered whether "IP Telephony providers meet the statutory definitions of offering "telecommunications" or 'telecommunications service' in section 3 of the 1996 Act[,]”⁴ and, as such, should be subject to Title II regulation. Indeed, the oft-quoted Commission statement that “[phone-to-phone IP] telephony lacks the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services[.]’”⁵ would seem to bode well for those that oppose AT&T's Petition. In some sort of mass act of hysterical blindness, however, the commenters that cite this language ignore the language in the subsequent paragraphs, which clarify that the Commission's statements are observations not Commission policy.

For the sake of ensuring a full record, IDT reproduces the pertinent paragraphs below:

We do not believe, however, that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings. As stated above, we use in this analysis a tentative definition of “phone-to-phone” IP telephony. Because of the wide

² See, Opposition of Verizon at 3-4 (“Verizon Comments”); Comments of the United States Telecom Association at 6-8 (“USTA Comments”); BellSouth's Opposition to AT&T's Petition for a Declaratory Ruling (“BellSouth Comments”) at 7-10; Comments of the New Hampshire Public Utilities Commission at 4; Comments of Qwest Communications International, Inc. at 7 (“Qwest Comments”); Reply Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 2 (“OPASTCO Reply Comments”) and Opposition of SBC Communications, Inc. at 9 (“SBC Comments”).

³ **Federal-State Joint Board on Universal Service**, Report to Congress, 13 FCC Rcd. 11501 (1998) (“Report to Congress”).

⁴ *Id.* at ¶ 85.

⁵ *Id.* at ¶ 89.

range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as a complete information and input as possible.

In upcoming proceedings with more focused records, we undoubtedly will be addressing the regulatory status of various specific forms of IP telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are 'telecommunications carriers.' The Act and the Commission's rules impose various requirements on providers of telecommunications, including contributing to universal service mechanisms, paying interstate access charges, and filing interstate tariffs. We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are 'telecommunications services,' and to the extent the providers of these services obtain the same circuit-switched access as obtained by other interexchange carriers, we may find it reasonable that they pay similar access charges. On the other hand, we likely will face difficult and contested issues relating to the assessment of access charges on these providers. For example, it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate. We intend to examine these issues more closely based on the more complete records developed in future proceedings.'

These paragraphs establish, beyond any shadow of a doubt, that the Commission did not conclude that phone-to-phone IP telephony is a telecommunications service subject to Title II. Therefore, the very basis upon which opponents to AT&T's Petition rely is unfounded, poisoning all arguments that flow thereunder.

⁶ *Id.* at ¶¶ 90-91

B. The Commission Has Never Acted To Regulate IP Telephony

In addition to the above language, the Commission has never undertaken certain actions it surely would have undertaken had it found phone-to-phone IP telephony providers to be telecommunications service providers under Title II.⁷ For example, after the Report to Congress, the Commission never undertook **any** effort to inform phone-to-phone IP telephony providers that they were subject to Title II regulation. The Commission never established a timetable (as surely it would have done if it concluded that phone-to-phone IP telephony providers were telecommunications service providers) for such providers to secure the necessary licenses to offer telecommunications service. Similarly, the Coinmission never revised its Form 499 to include phone-to-phone IP telephony revenues or conclude that phone-to-phone IP telephony providers were remiss in their collection and remittance obligations.⁸ Indeed, whether it be the Report to Congress, subsequent orders on relevant issues such as access charges or speeches given by individual Coinmission members in public fora,⁹ there is no evidence whatsoever that the Commission has regarded phone-to-phone IP telephony as a telecommunications service.

⁷ See, Joint Comments of Association for Communications Enterprises, Big Planet, Inc., Ephone Telecom, Inc., ICG Communications, Inc. and Vonage Holding Corp. at 2 (“[N]othing has changed since the *1998 Report to Congress* to justify any policy changes that would no longer allow the nascent market for VoIP services to flourish unfettered by burdensome government regulation while still in its developmental stage.”)(“Swidler Berlin Joint Comments”).

⁸ See, Swidler Berlin Joint Comments at 10-11 (“[T]he FCC specifically noted that it had previously decided to defer making pronouncements about the regulatory status of various forms of VoIP services and therefore deleted all language that appeared to change the Commission[‘s] existing regulatory treatment of VoIP services”)(Footnote omitted).

⁹ See, Swidler Berlin Joint Comments at 23; Comments of the Von Coalition at 7 (“VON Comments”).

C. IP Telephony Continues To Be A Nascent, Emerging Industry

Several commenters attempt to counter the Commission's concern with overburdening emerging IP services with excessive regulation by claiming that "[t]he long distance business is hardly a 'fledgling industry[.]'"¹⁰ Yet these Commenters are well aware that the "emerging service" at issue is IP telephony, not interexchange service, and that IP telephony is used to provide services other than interexchange service. As evidenced by the miniscule market share" of IP telephony and its continually evolving service offerings, IP telephony remains an undeveloped, emerging service worthy of continued regulatory forbearance. This forbearance is necessary for further development because, much like those ILECs that argue that it is not cost-effective to build new facilities that are subject to legacy regulation, AT&T and other carriers require regulatory forbearance so that it will continue to be economical to build facilities and use technologies that are not burdened by legacy regulation. Indeed, the benefit of investing in IP technologies is diminished greatly if the investing carriers cannot use these new technologies to offer service under business models other than those compelled by existing telecommunications regulations. At a time when investment in telecommunications and information service equipment is so desperately needed, it would be unwise – if not irresponsible – for the Commission to send signals to the industry that new investment provides no relief from legacy regulation.

¹⁰ Verizon Comments at 8; **See also**, "The interexchange industry is not nascent..." USTA Comments at ii; New Hampshire Comments at 7.

¹¹ "IP telephony service offerings are innovative and experimental services that represent a tiny fraction (between 1% and 5% of interexchange calling,") AT&T Petition at 27 *citing* Probe Research, Inc., *Voice Over Packet Markets*, 2 CISS Bulletin 11-16 at 4 (2001)

D. The Commission Has Justified The Regulatory Distinction Applied To IP Telephony

Certain commenters claim that “[T]here is no justification for favoring IP technology over every other phone-to-phone voice telephony technology in the way AT&T requests.”¹² Yet the Commission has already articulated its justification. Among its reasons were that: (1) there was an “absence of a more complete record focused on individual service offerings”¹³ and (2) it needed to determine “whether [the Commission’s] tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology.”¹⁴ Moreover, the Commission considered, but did not reach conclusions on the impact of imposing Title II rules regarding CPNI, 214 authorization, interconnection provisions of Section 251(a), TRS obligations, CALEA requirements, obligations under Sections 255 and 256, fees, reporting and filing requirements upon IP telephony.¹⁵ Furthermore, the Commission noted the benefits IP telephony brought to the international market and stated that if it were to conclude that phone-to-phone IP telephony was telecommunications, it would “need to consider carefully the international regulatory requirements to which phone-to-phone providers would be subject.”¹⁶ In so stating, the Commission explicitly raised the possibility of using its authority under Section 10 of the Act to forbear from applying the international accounting rate regime to IP telephony.” Thus, the Commission has clearly stated its justification for not applying access charges to

¹² Verizon at 5; See *also*, USTA Comments at i.

¹³ *Id.* at ¶ 90.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 91.

¹⁶ *Id.* at ¶ 93.

¹⁷ *Id.*

phone-to-phone IP telephony and has not stated a basis upon which that justification should be reversed or revised.

E. There Is No Support For The Claim That The Present Access Charge Regime Is Appropriate For Phone-to-Phone Telephony

Even if the Commission were to impose access charges on phone-to-phone IP telephony, there is no evidence to support the claim that AT&T should be subject to the existing access charge regime.¹⁸ Indeed, the Commission has stated that, even if were to conclude that phone-to-phone IP telephony should be considered a telecommunications service, such service would not necessarily be subject to standard access rates: “[T]o the extent the providers of *those* [phone-to-phone IP telephony] services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we *may* find it reasonable that they pay *similar* access charges on these providers.”¹⁹ The Commission’s qualifying use of “may” and “similar” indicates that, to the degree the Commission considered that phone-to-phone IP telephony might be a telecommunications service, it contemplated an alternate access charge regime, not the regime which certain ILECs have unilaterally imposed. Therefore, even if the Commission was to conclude in this proceeding that AT&T’s phone-to-phone IP telephony is a telecommunications service, the service could not be subject to the existing access rate regime without the Commission first undertaking an examination of the economic and policy implications of such a decision.

¹⁸ *See*, Swidler Berlin Joint Comments at 9.

¹⁹ Report to Congress at para 91 (*Emphasis added*).

F. Granting the ILEC Commenters' Requests Would Have Broad, Harmful Policy Implications for Phone-to-Phone IP Telephony Providers

Granting the requests that phone-to-phone IP telephony be regulated as a telecommunications service has several real-world outcomes that the commenters fail to address.²⁰ For example, many IP telephony providers have been operating under the reasonable assumption that they were not telecommunications service providers and were not offering telecommunications service. If the Commission were to do an about-face and state that phone-to-phone IP telephony is a telecommunications service, this could open providers to potentially devastating liability for unpaid telecommunications taxes and other telecommunications-related fees. Therefore, while IDT asserts that any conclusion that AT&T's phone-to-phone IP telephony service is a telecommunications service should be limited to AT&T's service offering, and not phone-to-phone IP telephony in general, if the Commission were to reach the broader conclusion, it would be compelled to make its decision prospective and permit a grace period prior to implementation so that providers could undertake the necessary legal, business and technical changes that would be compelled by such a determination.

Another harmful result of a policy based on the ILEC commenters' position would be that many phone-to-phone IP telephony providers might not be able to meet existing telecommunications service quality regulations. It is universally acknowledged that IP telephony is offered at a lower service quality and reliability than traditional telephony. Indeed, the Commission has conceded: "It may be argued that the poor sound of

²⁰ ("[O]ther regulatory issues that undoubtedly would be implicated by the implementation of VoIP access charge regime include: (1) whether VoIP providers should be subject to section 214; (2) whether VoIP providers should pay regulatory fees; and [(3)] whether VoIP providers are required to contribute directly to the various federal administrative funds, including universal service.") (Footnotes omitted), Swidler Berlin Joint Comments at 21-22.

[computer-to-computer] services when offered over the public Internet effectively constitutes a ‘change in the form or content’ of user information.”²¹ IP telephony users have been willing to forego service quality and reliability for cheaper rates. However, if the Commission declares that phone-to-phone IP telephony is a telecommunications service and subject to the various regulatory jurisdictions, IP telephony providers may not be able to meet the service quality and reliability standards required by law, thus forcing such providers from the marketplace. Since the Commission has already concluded that IP telephony serves the public interest,²² it should decline to act in a manner that could force IP telephony providers from the market.

G. Maintaining the Commission’s Existing Policy Toward IP Telephony Is Compelled By The Commission’s Report to Congress and Subsequent Orders

Several commenters use scare tactics to suggest that the Commission’s affirmation of its existing policy would somehow harm ILECs’ revenues, competition in the interexchange market, and USF funding.²³ This is preposterous. Such claims (“If granted, AT&T’s Petition will begin a chain reaction that will have potentially catastrophic consequences for the future of universal service support mechanisms[;]”²⁴ “One of the most significant ramifications would be the destruction caused to the universal service program....”²⁵) are as ridiculous as they are unsupported by fact. Granting AT&T’s Petition will have no net effect on USF funding, as revenue from phone-to-phone IP telephony has never been part of the USF contribution base. Moreover, since AT&T merely seeks a restatement of existing Commission policy and does not seek an exemption

²¹ Repoit to Congress at n.186.

²² *Id.* at ¶ 93.

²³ See, Sprint Comments at 3; USTA Comments at 9-10; Comments of the National Exchange Carrier Association at 5-7; and BellSouth Comments at 14-15.

²⁴ USTA Comments at ii.

²⁵ Bell South Comments at 15, n. 32

from any existing policy, there will be no effect on USF revenues as a result of granting AT&T's Petition. Therefore, the Commission should reject all unsupported arguments that maintaining its existing policy on IP telephony will harm existing support mechanisms.

Contrary to the claims of the USTA and others, the Commission is actually compelled to maintain its existing position on IP telephony in order to conform to conclusions reached in other proceedings. As described by the Joint Commenters, several significant Commission actions to implement access charge reform were done with the implicit and explicit understanding that IP telephony was not subject to access charges.²⁶ To conclude otherwise in this proceeding – even if only on the issue of AT&T's phone-to-phone IP telephony – would call into question the foundation upon which the Commission's present access charge regime is built. Thus, the Commission should retain its existing policies on IP telephony, lest any changes impact its access charge reform.

H. The Commission Should Preempt States From Regulating IP Telephony As A Telecommunications Service

IDT concurs with the Joint Commenters' request the Commission find that the phone-to-phone IP telephony is within its exclusive jurisdiction and thus subject to federal preemption.²⁷ As evidenced by the comments submitted by certain regulatory commissions,²⁸ there is a clear misunderstanding of the Commission's prior actions and, as evidenced by the NYPSC's *DataNet*²⁹ decision, a willingness to act contrary to the Commission's policies. Such inconsistent policymaking - where IP telephony is treated as a telecommunications service in some states, but not treated as a telecommunications

²⁶ See, Joint Commenters at 23-32

²⁷ *Id.* at 16-19.

²⁸ See generally, New Hampshire Comments and Comments of the New York Department of Public Service.

²⁹ *Complaint of Frontier Tel. Co. of Rochester Against US DataNet Corp. Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, No. 01-(1:-II)19 (N.Y.P.S.C. May 31, 2002).

service in other states and at the Federal level – chills investment and innovation by IP telephony providers. Thus, state preemption is needed to ensure a regulatory climate that will promote investment and innovation.³⁰ Moreover, IDT is concerned that even if the Commission acts favorably on AT&T's Petition, but fails to preempt state action, LECs, under the cover of friendly state rules and regulations, will bring claims before state regulatory commissions, thus effectively crippling IP telephony on a state-by-state basis, rather than on at the national level.

Decisive Commission action is also needed for a more practical and compelling reason: to halt the outrageous, self-help measures initiated by the ILECs.³¹ As evidenced by AT&T's Petition and the comments of Time Warner Telecom³² and others, ILECs, by virtue of their dominance of the local access market, can simply undertake unilateral action contrary to the Commission's rules and regulations whenever and wherever they so choose and force competitors to pay increased rates, radically alter business plans or abandon those plans altogether. When faced with such self-help measures, competitors' sole alternative is to seek redress before the Commission or in the courts, which may lead to a delayed resolution of the dispute, effectively eliminating any competitive advantage that might have otherwise been gained by timely, efficient market entry. The Commission should take this opportunity to remind the ILECs that they will be punished when their self-help measures violate the Commission's rules and regulations.

³⁰ See, Swidler Berlin Joint Comments at 13.

³¹ *Id.* at 15.

³² See, Time Warner Telecom Comments at 3.

CONCLUSION

For the reasons stated herein, IDT respectfully requests that the Commission grant AT&T's petition in its entirety.

Respectfully submitted,

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Dated: January 24, 2003

CERTIFICATE OF SERVICE

I, Carl Wolf Billek, hereby certify that a copy of the Reply Comments by IDT Corporation was sent by first class mail, postage prepaid, or via electronic mail on **January 24, 2003**, to those persons on the following Service List.

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